United Nations A/67/116

General Assembly

Distr.: General
28 June 2012

Original: English

Sixty-seventh session
Item 85 of the preliminary list*
The scope and application of the principle of universal jurisdiction

The scope and application of the principle of universal jurisdiction

Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 66/103, by which the Assembly requested the Secretary-General to prepare a report on the basis of information and observations received from Member States and relevant observers, as appropriate, on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, their domestic legal rules and judicial practice.

* A/67/50.

12-39529 (E) 090712

Please recycle

I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 66/103. It takes into account the continuing relevance of the reports of 2010 and 2011 (A/65/181 and A/66/93 and Add.1) on the scope and application of the principle of universal jurisdiction. The present report reflects comments and observations received since the issuance of the report of 2011 and should be read together with the reports of 2010 and 2011. Prior comments and observations have not been repeated in the present report.

2. In accordance with resolution 66/103, section II of the present report, together with tables 1 and 2, focus on specific information regarding the scope and application of universal jurisdiction on the basis of relevant domestic legal rules, applicable international treaties and judicial practice. Section III provides information received from observers, and section IV contains a synopsis of issues raised by Governments for possible discussion.

3. Responses were received from Cuba, El Salvador, Finland, Ghana, Kuwait, New Zealand, Panama, Sweden and Viet Nam. New Zealand indicated that its information and observations on the topic had been submitted to the Secretary-General in 2010, as reflected in his report (A/65/181).

4. A response was also received from the Organization for the Prohibition of Chemical Weapons.[1]

5. Owing to internal controls to ensure strict compliance with General Assembly resolutions on word limits for parliamentary documents issued by the Secretary-General, an attempt has been made to condense the submissions received without affecting the substance. The short form "universal jurisdiction" is used throughout the report where submissions may have described it as "the principle of" or "the concept of" universal jurisdiction. The complete replies are available from the website of the Sixth Committee under the heading "Sixty-seventh session".

II. Scope and application of universal jurisdiction on the basis of the relevant domestic legal rules, applicable international treaties and judicial practice: comments by Governments

A. Basic legal rules

1. Constitutional and other domestic legal framework

El Salvador

6. Recalling its previous comments (see A/66/93, paras. 19, 54, 84 and 143), El Salvador reiterated that article 10 of its Penal Code expressly recognized universal jurisdiction without establishing an exhaustive list of crimes; the key element for application of the principle was the commission of crimes that impaired legal rights

[1] The following observers advised that they had no relevant information or observations to submit: the Food and Agriculture Organization of the United Nations and the Organization for Security and Cooperation in Europe.

that are internationally protected by specific agreements or rules of international law, or entailed a serious breach of universally recognized human rights.

7. That requirement, however, did not diminish the importance of prior work to define international crimes within the domestic legal system; such definition was a prerequisite for ensuring that the conduct of criminal proceedings was characterized by legal certainty. El Salvador indicated that such prior work links State activity to the principle of legality, which assures those subject to the law that their conduct cannot be penalized other than by virtue of a law issued and promulgated prior to the commission of the act deemed to be an offence. For example, according to the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice of El Salvador, the principle of legality constitutes a guarantee for the individual that he or she may not be subject to any penalty or punishment that has not been previously established, thereby preventing abuses of power.[2]

8. In line with the foregoing, there had been recent reform of the Penal Code by which the crime of torture was included as a crime against humanity. The reform was based on the provisions of the Constitution of El Salvador that recognized the human person as the origin and purpose of the activity of the State, which is organized to attain justice, legal certainty and the common good and, furthermore, recognized that every person has the right to physical and psychological integrity.

9. The reform also derived from the State's obligation to align national legislation with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the State by means of Legislative Decree No. 833 of 23 March 1994. That instrument required that the Convention's provisions be implemented in good faith, including article 4 thereof, which required each State party to ensure that all acts of torture, as well as any attempt to commit torture and any act by any person that constitutes complicity or participation in torture, are offences under its criminal law.

10. In drafting the reform, particular attention was therefore paid to the definition contained in article 1 of the Convention, defining torture. Previously, torture was criminalized in article 297 of the Penal Code concerning offences relating to the fundamental rights and guarantees of the person, and the legal right protected was linked primarily to the individual rights of persons and the constitutional provisions establishing that no person shall be subjected to any condition that undermined his or her dignity or involved any form of torture. The definition of the crime thus did not yet incorporate with sufficient clarity its international dimensions.

11. Following the reform, torture now appears in title XIX of the Penal Code relating to crimes against humanity. Its inclusion under that title could bring about the future application of the principle of universal jurisdiction in specific cases, since it is now possible to link it to legal rights protected internationally, in this case, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as to the violation of universally recognized rights such as the right to personal integrity.

12. Moreover, the wording of the article was modified with the aim of broadening its scope and adapting it to cover different means of commission. One of the main

[2] Constitutional Chamber of the Supreme Court of Justice of El Salvador, Judgement No. 471-2005 (*amparo* proceedings), 22 January 2010.

changes introduced was the express prohibition of grave acts such as coercing, instigating or inducing others to commit torture and using torture as a means of coercion or intimidation.

13. Furthermore, the reform increased the statutory penalty for the crime of torture from 3 to 6 years of imprisonment to 6 to 12 years of imprisonment, and added the accessory penalty of disqualification from the corresponding public office or employment for the same period. Following the legislative reform, the crime was defined as follows:

> Article 366-A. Any official or public employee, public authority or law enforcement officer who, in the performance of his or her duties, intentionally inflicts severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, or who instigates, induces or consents to such acts or does not prevent their commission, shall be subject to 6 to 12 years' imprisonment and disqualification from the corresponding public office or employment for the same period.
>
> Any person who is instigated or induced to act by, or acts on behalf of, the persons referred to in the above paragraph, or acts as an accomplice, shall be subject to the general regime of perpetration and participation provided for in book I, title II, chapter IV, of this Code.
>
> The definition of torture shall not include physical or mental pain or suffering arising from or inherent in legal measures.

Ghana

14. Part Four of the Courts Act of 1993 (Act 459) provides in section 56, on the criminal jurisdiction of the Courts, that:

> (1) Subject to this section, the jurisdiction of the Courts in criminal matters is exercisable only in respect of an offence committed within Ghana including its territorial waters and air space and in respect of offences committed on a ship or an aircraft registered or licensed in Ghana.
>
> ...
>
> (4) Any person (whether a citizen or not) is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences:
>
> (a) Slave trade or traffic in slaves;
>
> (b) Piracy;
>
> (c) Traffic in women or children;
>
> (d) Falsification or counterfeiting or uttering of false copies or counterfeits of any official seal of Ghana or any currency, instrument of credit, stamp, passport, or public document issued by the Republic or under its authority;

(e) Genocide;

(f) Any offence against the property of the Republic;

(g) Any offence against the security, territorial integrity or political independence of the Republic;

(h) Hijacking;

(i) Unlawful traffic in narcotics;

(j) Attacks on any international communications system, canal or submarine cable;

(k) Unauthorized disclosure of an official secret of the Republic;

(l) An offence by or against a person in the employment of the Republic or a statutory corporation while acting in the course of the duties of such employment;

(m) Traffic in obscene publications;

(n) Any other offence which is authorized or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana wherever the offence was committed.

15. Moreover, article 1 of the Geneva Conventions Act of Ghana, 2009 (Act 708) provides that for the exercise of jurisdiction, indictments may be issued against any person of whatever nationality who commits an offence whether within or outside Ghana.

Kuwait

16. When present in the territory of Kuwait, perpetrators of crimes outside the country will be pursued in accordance with the Kuwaiti Penal Code, which was established by Law No. 16 of 1960.

17. Kuwait has also formulated a draft resolution on an integrated law that deals specifically with crimes under the Rome Statute of the International Criminal Court.

Panama

18. Panama indicated that universal jurisdiction had been applied in respect of crimes with implications for the international community, including drug trafficking, money-laundering, trafficking in persons and terrorism.

19. Panama suggested that Act No. 13 of 27 July 1994 invoked universal jurisdiction to regulate matters related to international cooperation in the investigation of drug trafficking crimes. Articles 33 and 34 read:

> Article 33: Investigations into the offences set out in article 261 of the Penal Code may also be launched in cooperation with, or at the request of, the State in which the said crimes were committed.
>
> Article 34: The Panamanian courts shall have jurisdiction over the crimes covered by the present special Act even where the crime that gave rise to the legal proceedings was committed abroad, provided that the crime or any of the elements thereof was committed, or produced all or some of its effects, in

Panamanian territory, and in other cases to which article 9 of the Penal Code applies.

20. In addition, Panama referred to article 389 of the Penal Code, as amended by article 11 of Act. No. 1 (2004), which expressly criminalized money-laundering:

> Anyone who receives, deposits, trades in, converts or transfers money, securities, property or other financial resources in the knowledge that they are derived from activities related to drug trafficking, fraud, illicit arms trafficking, trafficking in persons, kidnapping, extortion, embezzlement, corruption of public servants, terrorist acts, theft or international trafficking in vehicles, as provided for under Panamanian criminal law, with the aim of hiding or concealing their illicit origin or of helping to evade the legal consequences of such crimes shall be sentenced to 5 to 12 years' imprisonment and a fine of 100 to 200 days.

Sweden

21. Sweden reiterated information contained in paragraphs 43 to 45 of the previous report (A/66/93). It also noted that, pursuant to chapter 2, section 5.2, of the Swedish Criminal Code, the prosecution of crimes against international law that have been committed outside of Sweden required the authorization of the Government of Sweden. Moreover, the report and proposals of the Commission on International Criminal Law of Sweden, concerning international crimes and Swedish jurisdiction, which reviewed Swedish legislation on criminal responsibility for international crimes and jurisdiction over crimes under the Rome Statute of the International Criminal Court, had been remitted for comments, and preparations towards a Government bill were taking place.

Viet Nam

22. In Vietnamese law, the principle of territoriality is emphasized and is generally applied. In certain circumstances, however, extraterritorial jurisdiction is also exercised. Article 6, paragraph 2 of the Vietnamese Criminal Code of 1999, modified in 2009, provides:

> Foreigners who commit offences outside the territory of the Socialist Republic of Viet Nam may be prosecuted for such offences under the Penal Code of Viet Nam in circumstances provided for in the international treaties which the Socialist Republic of Viet Nam has signed or acceded.

With the exception of the Convention on the Prevention and Punishment of the Crime of Genocide, the other relevant treaties to which Viet Nam is a party (listed below in table 2) provide for a general duty of States parties to extradite or prosecute alleged offenders, irrespective of their nationality or where the alleged offences occurred. Accordingly, Viet Nam could exercise its jurisdiction where an offender was present in its territory and where it decided not to extradite him or her to another State even though that person was neither a national of Viet Nam nor had committed a crime in its territory.

2. Applicable international treaties

23. A list of the treaties referred to, on the basis of information received, by Governments is provided in table 2.

B. Conditions, restrictions or limitations to the exercise of jurisdiction

1. Constitutional and domestic legal framework

Kuwait

24. Within the context of bilateral agreements relating to international judicial cooperation, Kuwait indicated that there are rules applicable to the tracking of criminals and their extradition.

Sweden

25. To ensure an impartial and fair trial for all parties involved in an investigation or prosecution regarding international crimes, Sweden reiterated that it is of the utmost importance that the rule of law govern national judicial systems.

26. In order to initiate proceedings for international crimes that are not part of Swedish national law, such as, for example, crimes against humanity, the offence in question must fall within the scope of the national criminal law of Sweden. Sweden can exercise universal jurisdiction over such crimes if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.

27. In addition, as noted previously, prosecution over crimes against international law that have been committed outside of Sweden requires the authorization of the Government of Sweden.

2. Judicial and other practice

Finland

28. The first case tried by Finnish courts under universal jurisdiction proceeded through the district court and the court of appeal. The court of appeal gave its judgement on 30 March 2012, where it upheld the district court's decision that the defendant was guilty of the crime of genocide in his country of origin. The defendant was sentenced to life imprisonment. The judgement of the court of appeal is not yet final, as it may be appealed to the Supreme Court, provided that the Supreme Court grants leave to appeal.

III. Scope and application of universal jurisdiction: comments by observers

Organization for the Prohibition of Chemical Weapons

29. The Organization for the Prohibition of Chemical Weapons (OPCW) reiterated the information summarized in the previous report, regarding the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. In response to the extraterritoriality requirement contained in subparagraph 1 (c) of article VII of the Chemical Weapons Convention, 115 States have informed OPCW that they have extended their penal legislation to implement the prohibitions of the Chemical Weapons Convention to any activity undertaken anywhere by natural persons possessing their nationality.

30. The majority of States parties have tended not to address the issue of universal jurisdiction in their legislation implementing the Chemical Weapons Convention,

limiting the scope of their measures to the explicit requirements prescribed under the Convention. A limited number of States parties have gone beyond what is required by the Chemical Weapons Convention, however, and have provided for the exercise of universal jurisdiction by their national courts for crimes related to the Convention.

31. Moreover, States may have adopted other pieces of legislation, in accordance with general principles of international law or in response to obligations under other international conventions, allowing for the exercise of universal jurisdiction, under which crimes related to the Chemical Weapons Convention may be prosecuted. In that respect, the use of chemical weapons could, thus, constitute the material element of a crime prosecuted in a national court, if any other conditions established by the relevant legislation are met.

32. The only international crimes by individuals explicitly related to chemical weapons that have been codified by the international community are the war crimes of the use of poison or poisoned weapons and the use of asphyxiating, poisonous or other gases in both international and non-international armed conflicts. OPCW holds the view that there is a comprehensive and universal prohibition on the use of chemical weapons in both customary and conventional international law.

IV. Nature of the issue for discussion: specific comments by States

Cuba

33. Cuba[3] stressed that the application of universal jurisdiction should be regulated at the international level. Such regulation should envisage the possibility that, when a country applies the principle of universal jurisdiction, it should obtain the prior consent of the State in which the crime was committed or of the country or countries of which the accused is a national. Regulation at the international level should also establish the criteria for application of this principle and for its compatibility with the Charter of the United Nations, and should define it as exceptional and supplementary in nature.

34. Cuba holds the view that universal jurisdiction must be supplementary to the actions and national jurisdiction of each State; thus, the principle may not be applied where the accused person is being investigated and prosecuted by national courts. In addition, universal jurisdiction should be applied only under exceptional circumstances in which there is no other way to prevent impunity, and it should be seen as existing alongside domestic law and the jurisprudence of national courts.

35. Cuba also noted that the application of the principle should not violate the immunity granted under international law to Heads of State and Government, diplomatic personnel and other incumbent high-ranking officials. The filing of charges and issuance of arrest warrants against such officials not only constituted a violation of the international regulations in force, but also undermined the principle of the sovereign equality and independence of States.

[3] For previous comments submitted by Cuba, see the report of the Secretary-General for 2010 (A/65/181).

36. Cuba suggested that there was need to identify the crimes that were subject to universal jurisdiction and the circumstances under which it may be invoked. It is the view of Cuba that the list of such crimes should be restricted to crimes against humanity and, as noted previously, that universal jurisdiction should be invoked only when it has been established that there is no other way to bring criminal proceedings against the perpetrators. In this regard, it was noted that the Geneva Conventions of 1949 introduced the application of universal jurisdiction to violations characterized as "grave breaches". Although the Conventions do not expressly stipulate that jurisdiction must be exercised regardless of where the crime was committed, States have the legally established power to prosecute such crimes universally.

El Salvador

37. El Salvador reiterated that, unlike other principles that determine the jurisdiction of a State, universal jurisdiction is founded exclusively on the nature of the offence, the magnitude and particular gravity of which affect the very foundation of the national and international legal order and, in particular, the recognition of and respect for dignity as a basic value.

Panama

38. Panama noted that the Geneva Conventions of 1949 obligate States parties to look for suspected perpetrators, regardless of their nationality and of the place in which the alleged crime was committed, in order to bring them before their own courts or hand them over to another State party for prosecution.

39. Panama suggested that universal jurisdiction and the recourse to international criminal courts become valid ways to ensure that war crimes do not go unpunished and to prevent impunity only in the event that other States fail to take action regarding the prosecution of alleged perpetrators. Universal jurisdiction is an exceptional basis for jurisdiction and international law establishes the implementation framework for its exercise by States.

Viet Nam

40. Viet Nam considers that universal jurisdiction is the power of a State to prosecute individuals for the most serious international crimes in the absence of any link to the place where the crimes were committed, the nationality of the alleged perpetrators, the nationality of the victims or the interest of that State.

41. Viet Nam holds the view that universal jurisdiction should be applied with much caution and within a well-established framework in order to avoid any abuse that may go against the principle of the sovereign equality of all States. Viet Nam suggests that the exercise of universal jurisdiction must be subject to the following principles and conditions:

(a) Universal jurisdiction may only be exercised over the most serious international crimes, namely genocide, crimes against humanity and war crimes;

(b) Universal jurisdiction is supplemental to other jurisdictions that have a stronger link to the crimes, such as territorial jurisdiction or nationality jurisdiction. In the event the State where the crimes occurred or the State of nationality of the alleged perpetrators or the State of nationality of the victims is able to prosecute the crimes in question, universal jurisdiction should not be exercised;

(c) A State should exercise universal jurisdiction over a crime only when the alleged perpetrator is present in its territory;

(d) Any State having custody over an alleged perpetrator, before exercising universal jurisdiction, should consult the State where the crime occurred and the State of nationality of the person concerned to determine whether either State is preparing to prosecute the alleged perpetrator. The custodial State should extradite the person concerned to either of those States for prosecution if requested. If those States are unable or unwilling to exercise their jurisdiction over the crime in question, the custodial State may proceed with its universal jurisdiction;

(e) The exercise of universal jurisdiction should take into account the principle of dual criminality, that is to say, an act subject to universal jurisdiction exercised by a State also constitutes a crime under the law of the State where the act was committed;

(f) The prosecution and trial of an alleged perpetrator on the basis of universal jurisdiction must comply with universally recognized standards of human rights and international humanitarian law.

Table 1
Specific legislation relevant to the subject, based on information submitted by Governments

Category	*Legislation*	*Country*
Piracy	Courts Act, 1993 (Act 459)	Ghana
Slave trade or traffic in slaves	Courts Act, 1993 (Act 459)	Ghana
Genocide	Courts Act, 1993 (Act 459)	Ghana
	Genocide Act, 1964	Sweden
Torture	Penal Code, title XIX ("crimes against humanity"), article 366-A	El Salvador
Crimes against international law	Swedish Criminal Code, chapter 2, section 3.6 and chapter 22, section 6 (defining a crime against international law as "a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts")	Sweden
Offences against State and international security	Courts Act, 1993 (Act 459) (listing offences against the security of the State, unauthorized disclosure of an official State secret, offences against the property of the State and attacks on an international communications system, canal or submarine cable as offences subject to criminal jurisdiction)	Ghana

Category	*Legislation*	*Country*
Hijacking	Courts Act, 1993 (Act 459)	Ghana
Offences against morality and exploitation	Courts Act, 1993 (Act 459) (listing traffic in women or children and traffic in obscene publication as offences subject to criminal jurisdiction)	Ghana
	Act No. 23 of 7 July 2004 (approving article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime)	Panama
Money-property-laundering	Penal Code, article 389, as amended by article 11 of Act No. 1 of 5 January 2004	Panama
Falsification or counterfeiting of an official seal, currency, instrument of credit, stamp, passport or public document of the State	Courts Act, 1993 (Act 459)	Ghana
Trafficking in narcotics/ drugs	Courts Act, 1993 (Act 459)	Ghana
	Act No. 13 of 27 July 1994	Panama

Table 2
Relevant treaties that were referred to by Governments, including treaties containing *aut dedere aut judicare* provisions

A. Universal instruments

Genocide	Convention on the Prevention and Punishment of the Crime of Genocide, 1948	Viet Nam[a]
International humanitarian law	Geneva Conventions of 1949	Cuba, Ghana,[b] Panama, Viet Nam
International criminal law	Rome Statute of the International Criminal Court, 1998	Kuwait, Sweden
Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	El Salvador,[c] Sweden
Apartheid	International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973	Viet Nam

Trafficking in persons	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000	Panama
Crimes against internationally protected persons, including diplomatic agents	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973	Viet Nam
Enforced disappearance	International Convention for the Protection of All Persons from Enforced Disappearance, 2006	Panama
Terrorism-related offences	Convention for the Suppression of Unlawful Seizure of Aircraft, 1970	Viet Nam
	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971	Viet Nam
	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988	Viet Nam
	International Convention for the Suppression of the Financing of Terrorism, 1999	Viet Nam
	ASEAN Convention on Counter-Terrorism, 2007	Viet Nam
Protection of cultural property in the event of armed conflict	Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1999	Panama
General	Charter of the United Nations, 1945	Cuba

[a] All treaty offences attributed in this table to Viet Nam have been implemented domestically pursuant to the Vietnamese Criminal Code of 1999 (modified in 2009), article 6, paragraph 2.

[b] Geneva Conventions Act of Ghana, 2009 (Act 708).

[c] Legislative Decree No. 833 of 23 March 1994 (ratifying the Convention).

B. Bilateral instruments

Extradition and mutual assistance in criminal matters	Bilateral agreements on extradition and on legal assistance in criminal matters were also mentioned	Kuwait